ECORD
AND
RIEFS.

No. 15-513

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner,

v.

UNITED STATES, EX REL. CORI RIGSBY, ET AL.
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

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Arthur R. Miller, Federal Practice & Procedure (3d ed.) 11

Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide*, Federal Judicial Center (2010) 44

Restatement (Second) of Contracts (Am. Law. Inst. 1981) 42, 43

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BRIEF FOR RESPONDENTS

The False Claims Act (FCA) is the government's principal tool for redressing fraud at the hands of unscrupulous contractors. Its effectiveness depends on qui tam lawsuits by whistleblowers. Under the statute, qui tam complaints are filed in camera. The district court then enters a sealing order and the complaint remains under seal for at least sixty days, during which it cannot be served on the defendant and the existence of the lawsuit should not be publicly disclosed. That temporary seal has a clear purpose: it prevents the defendant from learning of the lawsuit while the government determines whether the qui tam litigation will interfere with an ongoing criminal investigation, and decides whether to intervene. The seal thus mitigates the risk that a defendant, having been tipped off, will take steps to undermine a federal investigation.

The statute does not specify a consequence if a relator or her attorney violates a seal order, nor does it state that compliance is a prerequisite to suit. Thus, the ordinary rule—embraced by the vast majority of courts that have considered the question—is that district courts have discretion to fashion an appropriate sanction. These sanctions can include, for example, financial penalties, disqualification of attorneys, or dismissal of the complaint. Dismissal, however, ought to be a last resort because it necessarily impairs the government's interest in recovering damages for fraud, thus harming the principal beneficiary of both the FCA in general and the seal requirement in particular. Other sanctions can punish and deter seal violations without imposing costs on the government.

State Farm rejects the ordinary rule, arguing that every seal violation always compels dismissal. For example, if a relator's attorney, acting without the relator's knowledge, inadvertently updated his law firm website to reflect the pendency of the action a year after the complaint was filed, on the night before the seal was due to be lifted, State Farm's rule would require dismissal—even if nobody saw the website, nobody suffered any prejudice, and the government wanted the relator to litigate the case. Dismissal would be counterproductive, but State Farm's rule strips district courts and the government of any ability to prevent it.

The parade of horribles goes on and on, and it marches only in one direction because the rigidity of State Farm's rule inevitably produces injustice while the flexibility of the majority rule prevents it. But we need not rely on hypotheticals: the facts of this case illustrate the wisdom of a discretionary approach, and of the judgment below.

Briefly, State Farm, the nation's largest insurer, committed a massive fraud on the United States after Hurricane Katrina. Respondents Cori and Kerri Rigsby discovered the fraud and blew the whistle, losing their jobs in the process. The fraud was proven before a jury, and the government now stands to recover billions. Yes, there were violations of the district court's seal order. But those violations did not reveal this lawsuit to the public at large or tip off State Farm, and therefore did not prejudice the government. Moreover, the attorneys who perpetrated the seal violations did so without the Rigsbys' knowledge or consent. Those attorneys have been disqualified from the case, and neither the

Rigsbys nor their current attorneys personally engaged in any misconduct.

In sum, dismissal would reward a proven fraudster while punishing the government and the innocent relators—even though the violations prejudiced nobody, and even though the actual violators will suffer no consequence. Because dismissal would be unjust, unwise, and inconsistent with Congress's design in enacting the FCA, this Court should affirm.

STATEMENT OF THE CASE

A. Statutory Background.

The FCA provides that "any person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval" or "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" is "liable to the United States Government." 31 U.S.C. § 3729(a)(1). The vast majority of FCA suits are filed by relators under the qui tam provision, *id.* § 3730(b), which has facilitated enforcement since the statute was enacted in 1863. *See* 155 Cong. Rec. E1295 (June 3, 2009) (speech of Rep. Berman).

In 1943, the Attorney General became concerned about "parasitic lawsuits" that were "based solely on information contained in criminal indictments." *Id.* These cases "contributed nothing new and could interfere with the Government's criminal prosecutions." *Id.* Congress responded by amending the FCA to prohibit private lawsuits based on information known to any government employee. It also created a mechanism for the government to take

over a qui tam lawsuit, and it reduced the relators' award from 50% to a maximum of 25% (or 10% if the government intervened), with no minimum. *See id.*

"These changes put the False Claims Act into hibernation. By the 1980s, it had become evident that the False Claims Act was no longer an effective tool against fraud." *Id.* Instead, because of the 1943 FCA amendments, "[f]raud against the Government had grown to unprecedented levels." *Id.* at E1296.

In 1986, Congress amended the FCA "to encourage more private enforcement suits." S. Rep. No. 99-345, at 23-24 (1986) (Senate Report). Congress found that in "the face of sophisticated and widespread fraud only a coordinated effort of both the Government and the citizenry will decrease this wave of defrauding public funds." *Id.* at 2. That is because "[d]etecting fraud is usually very difficult without the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity." *Id.* at 4.

Consequently, the 1986 amendments increased the rewards for relators, replaced the "government knowledge" bar with a less stringent "public disclosure" bar, and provided that the relator would stay involved in a case even if the government intervened.

However, the Department of Justice raised a concern:

> that a greater number of private suits could increase the chances that false claims allegations in civil suits might overlap with allegations already under criminal investigation. The Justice Department

> asserted that the public filing of overlapping false claims allegations could potentially 'tip off' investigation targets when the criminal inquiry is at a sensitive stage. While the Committee does not expect that disclosures from private false claims suits would often interfere with sensitive investigations, we recognize the necessity for some coordination of disclosures in civil proceedings in order to protect the Government's interest in criminal matters.

Id. at 24.

To accommodate the Department, Congress provided that in qui tam suits, "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). "The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal." *Id.* § 3730(b)(3). Whether to grant such extensions rests within the sound discretion of the district court.

The seal is "intended to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and whether it is in the Government's interest to intervene and take over the civil action." Senate Report at 24. On the other hand, Congress was explicit that "[b]y providing for sealed complaints, the Committee *does not intend to affect defendants' rights in any way.*" *Id.* (emphasis added).

Importantly, the FCA seal provisions "limit the relator only from publicly discussing the filing of the qui tam complaint." *ACLU v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011). Thus, in order to violate the seal, a disclosure must be "public," and it must disclose the "filing of the qui tam complaint." Private, confidential disclosures—for example to a spouse or co-counsel—do not violate the seal. *See, e.g.*, *United States ex rel. Gale v. Omnicare, Inc.*, No. 1:10-CV-127, 2013 WL 2476853, at *3 (N.D. Ohio June 7, 2013) (holding that relator's "comments to his wife do not qualify as public"). Similarly, disclosures of underlying facts do not violate the seal. *ACLU*, 673 F.3d at 254. Indeed, because frauds on the government are core matters of public interest, it would raise grave First Amendment concerns if the statute were construed to prohibit relators from speaking about them.[1]

In the Fraud Enforcement and Recovery Act of 2009, Congress again amended the FCA, expanding the scope of substantive liability. Pub. L. No. 111-21,

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[1] The lower courts rejected State Farm's argument that disclosure of the allegations underlying a qui tam complaint violates the seal. Pet. App. 21a-22a, 61a-62a. It is unclear whether State Farm continues to press this contention. *Compare* Pet'r Br. 8-12 (referring only to alleged violations involving disclosure of the existence of the suit) *with id.* 54 n.10 (arguing that the disclosure of the substance of allegations has the potential to harm the government). Assuming it does, that argument is outside the scope of the Question Presented and also meritless. State Farm cannot cite a case for its interpretation of the law, and the consensus view is that the seal "undisputedly permits" relators to publicly discuss "the facts underlying [their] allegations of fraud." *E.g.*, U.S. Br. at 26, *ACLU v. Holder*, 673 F.3d 245 (4th Cir. 2011) (No. 09-2086).

123 Stat. 1617 Congress felt compelled to act because judicial decisions had allowed defendants to "escape responsibility for proven frauds." S. Rep. No. 111-10, at 4 (2009). The Patient Protection and Affordable Care Act further amended the FCA in 2010, again to encourage whistleblower actions. Pub. L. No. 111-148, 124 Stat. 119.[2]

All evidence indicates that the FCA is again fulfilling its purpose. In 2015, the government recovered over $3.5 billion under the statute, of which $2.9 billion came from whistleblower suits, including over $1 billion from cases in which the United States declined to intervene. U.S. Dep't of Justice, Fraud Statistics – Overview 2 (Nov. 23, 2015), https://www.justice.gov/opa/file/796866/download. In 2014, the government recovered $5.7 billion, more than half attributable to whistleblower suits. *Id.*

B. State Farm's Proven Fraud.

1. Hurricane Katrina was one of the deadliest natural disasters in U.S. history and by far the most expensive. More than 1800 Americans died and countless more lost their homes and livelihoods as brutal winds wracked their communities, followed by a surge of water that flooded the coast. *See* John L. Beven II, et al., *Annual Summary, Atlantic Hurricane Season of 2005*, 136 Monthly Weather Rev 1109, 1140 (2008).

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[2] Neither the 2009 nor 2010 amendments altered the seal requirement; most are not retroactive to this action.

Many homeowners relied on insurance proceeds to restart their lives. State Farm had issued thousands of homeowner insurance policies to affected homes. Along with dozens of other insurers, State Farm was placed in a position of public trust, adjusting and paying flood insurance claims under policies issued by the National Flood Insurance Program (NFIP) alongside claims under its own policies. Pet. App. 3a. State Farm, acting as a fiduciary of the government under the NFIP's Write Your Own (WYO) program, was to determine whether and to what degree homes were damaged by wind (in which case State Farm would pay its own money) or by flooding (in which case it would pay from public funds). *Id.* 3a-4a. Thus, State Farm had "an incentive to classify hurricane damage as flood-related to limit its economic exposure." *Id.* 2a. The Federal Emergency Management Agency (FEMA), which oversees the NFIP, gave State Farm clear directives to follow in making these determinations. *Id.* 4a-5a.

State Farm abused the government's trust by flouting these directives, instructing its adjusters to misclassify wind damage as flood damage, and submitting falsified reports to support those classifications. Thus, State Farm policyholders who had no flood insurance received little or nothing; those who had flood insurance received payments from the government; and State Farm itself avoided paying hundreds of millions in claims.

2. These allegations were proven in a two-week bellwether trial relating to the claims adjustment process for a home in Biloxi, Mississippi, which belonged to the McIntosh family. The evidence and

testimony showed that devastating winds had rendered the house a total loss before the arrival of any flood water, making State Farm liable for all of the damage under the McIntoshes' homeowner policy. *See id.* 34a-35a. State Farm nevertheless submitted a claim to the government for $250,000 in flood damage (the policy limit), while paying a pittance under its own policy for wind damage. *See id.* 5a, 86a.

This misclassification was part of a deliberate fraud on the government. At a meeting shortly after Hurricane Katrina, a State Farm supervisor named Lecky King instructed adjusters that because Katrina was mostly a "water storm," they were "not going to see a lot of wind damage," and they should classify all substantial damage as flood damage. *Id.* 4a, 15a, 127a. King and her underlings further instructed adjusters to manipulate damage estimating software that FEMA had not approved in order to "hit the limits" of the federal flood policies. *Id.* 28a, 127a. Rather than preparing the comprehensive, line-by-line estimates of flood damage that FEMA required, State Farm's software generated invalid guesstimates based on square footage, while generating fictitious line-by-line reports of fake houses to give the appearance that State Farm had done proper adjustments. *Id.* 4a-5a, 127a-31a. This ruse so completely deceived FEMA that even the agency's chief re-inspector could not tell that a State Farm report was fake. *See id.* 41a, 128a.

For the McIntosh home, the adjusters, including relator Kerri Rigsby, followed State Farm's instructions and used the unapproved software to hit the flood policy limits and produce a false estimate attributing the damage to flooding. *Id.* 5a. Three days

later, State Farm paid the McIntoshes approximately $250,000 in government funds for their home. *Id.* 5a-6a.

State Farm also retained an engineering company to determine the primary cause of loss. An experienced engineer concluded that wind was the primary cause. *Id.* After receiving the report, State Farm "refused to pay [the engineering firm] and withheld the report from the McIntosh NFIP file." *Id.* 6a. King "pressured" the engineering company to change the conclusion "at the risk of losing contracts with State Farm." *Id.* The firm promptly produced a second report validating State Farm's claim that flooding had caused the damage. *Id.*

The jury agreed that wind had rendered the house a total loss before the arrival of any floodwater, making the damage solely State Farm's responsibility. *Id.* 7a-8a. The jury found that State Farm intentionally submitted a false claim for payment ($250,000 for non-existent flood damage) and made or used a false record (the fake line-by-line estimate). *Id.* The evidence at trial also showed that State Farm's fraudulent practices were widespread, and the jury's findings necessarily rejected State Farm's arguments that it had acted lawfully. *See id.* 15a-18a. While the full scope of State Farm's fraud has not yet been determined, "[a]t a minimum, the trial record supports a high probability that State Farm submitted more than one false claim." *Id.* 16a.[3]

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[3] State Farm's brief (at 14-15) relitigates the case, highlighting evidence that State Farm believes supports its story and refusing to acknowledge that it committed fraud. But

C. The Filing Of The Qui Tam Complaint And The Subsequent Seal Violations.

1. Respondents Cori and Kerri Rigsby were employed by E.A. Renfroe & Co., an insurance adjuster, and were adjusting claims for State Farm on a contractual basis after Hurricane Katrina. Pet. App. 3a. In the course of their duties, the Rigsbys gained firsthand knowledge of State Farm's fraud and decided to come forward.

They did so against a backdrop of public outcry. The Mississippi Attorney General had subpoenaed State Farm for documents relating to Katrina claims. J.A.763. Thousands of homeowners had also sued State Farm and other WYO insurers, claiming that the insurers had inappropriately denied homeowner insurance claims. "[L]iterally thousands" of those lawsuits turned on the same fraud that the Rigsbys had witnessed: that State Farm had avoided liability by falsely characterizing wind damage as flood damage. Pet. App. 66a. Some of the public lawsuits overlapped further, alleging not only "deliberate mischaracterization of damage causation," but also "that the insurers' conduct created inflated and false flood insurance claims under the" NFIP. *Id.* 64a.

Many homeowners were represented by Dickie Scruggs, a famous trial lawyer who had successfully

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this Court should view "the evidence in the light most favorable to the party that prevailed before the jury, assume that all conflicts in the evidence were resolved in favor of that party by the jury, and give that party the benefit of all reasonable favorable inferences." 9B Arthur R. Miller, Federal Practice & Procedure § 2540 (3d ed.).

spearheaded major lawsuits against the asbestos and tobacco industries. *Id.* 63a. Scruggs, who had lost a home himself, declared that the homeowners' lawsuits were "very personal" to him because they affected his family, friends, and community. J.A.486. He established a working group of attorneys, the Scruggs Katrina Group, which litigated those cases with sharp elbows, using "every trick in the book" to gain an advantage. *Id.*

When Scruggs became aware of the Rigsbys' knowledge and willingness to come forward, he sought their testimony in the homeowners' cases. He also began representing the Rigsbys in this qui tam action. However, Scruggs never acknowledged potential conflicts of interest that could arise between the Rigsbys and his other clients.

The Rigsbys copied and delivered documents to state and federal law enforcement describing State Farm's fraud. When they disclosed to their employer, Renfroe, what they had done, they were terminated. *See* J.A.15-16. Renfroe also sued the Rigsbys for taking documents revealing State Farm's fraud. *Renfroe & Co., Inc. v. Rigsby*, No. 06-cv-1752-WMA (N.D. Ala.).

2. On April 26, 2006, the Rigsbys' qui tam complaint was filed in camera and under seal, as the FCA requires. The district court entered an order stating that "the Complaint filed in this action shall be received *In Camera* and under Seal and shall not be served on Defendants until further order of this Court," and that "neither this Order nor the underlying Complaint appear on any docket available to the public until further Order of this Court." J.A.2.

On January 10, 2007, the district court partially unsealed the case to permit disclosure of its existence to the judge in the *Renfroe* litigation. *Id.* 5. The court later entered an order extending the seal and expanding its scope to cover other filings in addition to the complaint. *Id.* 8.

3.a. Unbeknownst to the Rigsbys, Scruggs engaged in litigation misconduct in order to advance the homeowner lawsuits. Among other misdeeds, Scruggs violated the district court's seal order in the qui tam action. The lower courts found three such violations.

First, on August 7, 2006—103 days after the complaint was filed—Scruggs' assistant emailed the evidentiary disclosure that had been served upon the government to a journalist at ABC. J.A.332-69. Later that month, the program *20/20* described State Farm's fraud without disclosing the qui tam action. Instead, the program focused on the homeowner lawsuits, noting that "many [homeowners] accuse [State Farm] and other insurance companies of wrongly denying or low-balling their claims," and that "[t]he Rigsby sisters' allegations, if proven, would support the suspicions of thousands of homeowners along the Mississippi Gulf Coast who have not been able to get the insurance money to rebuild their homes." *Id.* 385.

Second, on August 14, 2006, Scruggs e-mailed the evidentiary disclosure to a reporter at the Associated Press. *Id.* 414-48. The ensuing article did not reveal the qui tam action. Instead, it explained that the Rigsbys "were helping [Scruggs] build cases against insurers for denying claims for Hurricane Katrina losses," and that the documents the Rigsbys

had obtained "show that the insurer defrauded policyholders by manipulating engineers' reports so that claims could be denied." *Id.* 246.

Third, on September 18, 2006, Scruggs' assistant e-mailed the disclosure to a reporter at *The New York Times*. *Id.* 449-83. On March 16, 2007, the paper profiled Scruggs and his efforts to obtain relief for the homeowners, without revealing the existence of the qui tam lawsuit. *Id.* 484-86.

The lower courts found that the seal effectively ended on January 10, 2007, when it was partially lifted to permit the disclosure to the judge presiding over the public *Renfroe* litigation. Pet. App. 21a, 63a. That was because the partial unsealing order did not specify that the disclosure had to occur privately, and also because one of Renfroe's public filings announced that "[t]he likelihood of a qui tam suit brought by the [Rigsbys] with Scruggs as their attorney is already known, so taking steps to keep it confidential is not necessary " Renfroe's Response to Joint Motion for Ex Parte Status Conference, *E.A. Renfroe & Co., Inc. v. Rigsby*, No. 06-cv-1752-WMA, ECF No. 85, at 2 (N.D. Ala. Jan. 18, 2007). The lower courts thus found that the partial lifting effectively (albeit inadvertently) rendered the seal moot, and therefore found that alleged violations after that date did not warrant sanctions.

b. Importantly, all of the seal violations were perpetrated by Scruggs and his colleagues—without the Rigsbys' knowledge or participation. The lower courts both found "no indication that the Rigsbys themselves communicated the existence of the suit in the relevant interviews," Pet. App. 23a, and "nothing in the record to suggest that the disclosures in

question were authorized by or made at the suggestion of the Relators," *id.* 68a.

The closest State Farm comes to showing that the Rigsbys themselves violated the seal is to note that on September 16, 2006, the Rigsbys met with Gene Taylor, a Congressman from Mississippi. Pet'r Br. 9. On September 21, Taylor publicly opined that State Farm had violated the FCA, without mentioning this lawsuit. J.A.539-41. The district court found no seal violation because the Rigsbys did not divulge the existence of the lawsuit during that meeting, and Taylor's subsequent statement did not disclose it either. *See* Pet. App. 65a. Moreover, there is reason to doubt that disclosures to federal officials violate the seal. *See* Part III, *infra*.[4]

4. The district court lifted the seal in August 2007 after determining that the government would not suffer prejudice. J.A.11. On January 31, 2008, the

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[4] Despite clear contrary factual findings, State Farm's brief misleadingly states, at least six times, that respondents personally violated the seal. *See* Pet'r Br. 20, 42, 43, 44, 45, 54 n.10.

State Farm's citation (at 13) to a hearing transcript, J.A.68, to suggest that the relators personally violated the seal is likewise misleading because none of the alleged violations were actually violations. One was the meeting with Representative Taylor. The remainder involved only the disclosure of the underlying facts or internal discussions that had little to do with the lawsuit. *See* Pet. App. 45a-46a (items 4, 5, and 6, describing interviews discussing the underlying allegations), 54a-55a (items 30, 33-38, an internal e-mail exchange about editing the relators' Wikipedia page).

government declined to intervene in this action, and so the relators carried it forward. Pet. App. 7a.

In March 2008, Scruggs, who had been indicted for attempting to bribe a state court judge in order to facilitate the resolution of a fee dispute related to the homeowner actions, withdrew as the Rigsbys' counsel. *See* J.A.17 In May 2008, every attorney who had worked with Scruggs was disqualified from this case. *Id.* 13.[5] The Rigsbys then obtained new counsel (their current attorneys), who have not engaged in any misconduct. Thus, the only people who violated the seal—Scruggs and his colleagues—have no financial interest in this litigation.

D. The District Court Proceedings And Decisions.

State Farm moved to dismiss this action on account of the seal violations. After considering all of the evidence and arguments, the district court denied State Farm's motion. The court adopted the test announced in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995), under which dismissal for seal violations is discretionary, and the key "factors to determine the appropriate sanction, if any," are the harm suffered by the government, the relative severity of the seal violation, and whether

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[5] The attorneys were disqualified because they were aware that Scruggs had made improper salary payments to the Rigsbys. J.A.13. The district court was careful to note, however, that the Rigsbys themselves were not "aware of the ethical implications" of the payments, were not "bound by the rules of professional conduct that apply" to attorneys, and were not culpable. *Id.* 21.

there is evidence of bad faith or willfulness. Pet. App. 59a.

The district court explained that the seal effectively ended when it was partially lifted, and the court therefore considered only alleged violations that occurred before January 10, 2007 *Id.* 63a. Applying the *Lujan* test to those violations, the court denied the motion to dismiss.

First, the government had not been harmed. Indeed, State Farm's attorney admitted at the motions hearing that notwithstanding the violations, State Farm did not learn of the lawsuit until "the date we were served which was right after the unsealing on August 1, 2007." J.A.67 Thus, State Farm had no opportunity to impede the government's investigation, and the district court found that "these violations of the seal *could not have* impaired the government's ability to investigate." Pet. App. 67a (emphasis added).

The district court found next that the violations were not as severe as the violations in *Lujan* because the materials were properly filed in camera and kept under seal for a substantial period of time. Moreover, their premature disclosure to journalists did not result in a broader public disclosure of the existence of the qui tam action. *Id.* 67a-68a.

With respect to bad faith, the court found that the Rigsbys had not personally violated the seal, and that there was "no basis to conclude that the Relators have acted willfully or in bad faith." *Id.* 68a. Instead, the district court determined that Scruggs and his colleagues were acting "as advocates for their clients who had homeowners policy claims" when they,

alone, violated the seal. *Id.* On these facts, the district court determined that dismissal was an inappropriate sanction. *Id.* 69a.

After further motions practice and discovery, the district court held the bellwether trial. The jury returned a unanimous verdict finding that State Farm had violated the FCA. *Id.* 117a. The court awarded $758,250 in damages ($227,475 of which went to the Rigsbys), as well as attorney's fees. *Id.* 8a. State Farm's post-trial motion attacking the verdict was denied. *Id.* 145a.

Having prevailed in the bellwether trial, the Rigsbys sought further discovery. Because the evidence showed that State Farm used identical fraudulent techniques to adjust thousands of claims, the Rigsbys sought to determine the full scope of the fraud. The district court, however, denied discovery. The Rigsbys appealed from that denial, and State Farm cross-appealed from the judgment against it on the bellwether claim. *See id.* 2a.

E. The Fifth Circuit's Decision.

The Fifth Circuit ruled in the Rigsbys' favor on every question. It upheld the verdict, Pet. App. 31a-41a, and granted the Rigsbys further discovery, *id.* 8a-18a.

On the seal issue, the Fifth Circuit, like the district court, "embrace[d] the *Lujan* test." *Id.* 20a. It reviewed the denial of the motion to dismiss for abuse of discretion, and agreed with the district court that it was appropriate to consider only the period prior to the partial lifting of the seal, and to consider only disclosures of the existence of the suit as opposed to the underlying allegations. *Id.* 21a-22a.

Applying the *Lujan* factors, the court of appeals concluded that "none of the disclosures appear to have resulted in the publication of the existence of this suit before the seal was partially lifted," and so "the government was not likely harmed" because "State Farm was not tipped off about the existence of the suit from the Rigsbys' disclosures." *Id.* 22a. The court also held that the violations were "considerably less severe" than in cases where the complaint was never filed under seal. *Id.* 22a-23a. And it found "no indication that the Rigsbys themselves communicated the existence of the suit in the relevant interviews," and so had not acted in bad faith—but even if Scruggs' disclosures were imputed to them (which the court assumed was permitted, *id.* 22a n.9), dismissal would not be warranted. *Id.* 23a.

State Farm sought certiorari on two questions: "What standard governs the decision whether to dismiss a relator's claim for violation of the FCA's seal requirement"; and a second question relating to scienter. Pet. i. The Solicitor General urged denial, arguing that the Fifth Circuit had adopted the correct standard regarding seal violations, and that the second question was unworthy of review. *See generally* U.S. Invitation Br.

This Court granted certiorari only on the first question. 136 S. Ct. 2386 (Mem). Thus, for present purposes, State Farm's fraud is an established fact. The only question is whether, notwithstanding that fraud, it will escape liability because of the seal violations.

SUMMARY OF ARGUMENT

I. The lower courts correctly held that district courts have discretion to fashion an appropriate sanction for a seal violation, taking into account the degree of harm to the government, the severity of the violation, and whether the relator acted in bad faith.

A. The text, structure, history, and purpose of the FCA and its seal requirement demonstrate that a discretionary sanction is appropriate.

The FCA provides that qui tam complaints "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). It never provides that seal violations compel dismissal. The mere fact that the statute uses the term "shall" does not command that result: it creates a duty to comply with the seal provision, but it does not establish the consequence of a breach of that duty. This Court has repeatedly held that when faced with such a statute, courts should not automatically impose the most drastic sanction.

Other textual indicators prove that dismissal is not a mandatory sanction for every seal violation. For example, the FCA contains other provisions that use "shall," but even State Farm concedes that violations of those do not compel dismissal. On the other hand, the FCA contains a number of requirements that expressly mandate dismissal for violations, showing that Congress knew how to incorporate such remedies into the FCA, but chose not to do so for the seal. Instead, by requiring that complaints be kept "under seal," Congress deliberately imported the familiar concept of judicial seal orders—the violation

of which has always invoked discretionary sanctions, and rarely results in dismissal.

The FCA's text is bad for State Farm; the statutory purpose is devastating. The FCA was enacted to protect the government from fraud. The 1986 Amendments were enacted to advance that goal by encouraging more qui tam suits. And the seal requirement was enacted to allow the government to conduct investigations in secret—not for secrecy's own sake, but again for the purpose of preventing and redressing fraud.

The Court should strive for an interpretation of the statute that achieves all of its purposes. To the extent those purposes conflict with each other, the Court should adopt an order of preference that reflects Congress's priorities.

The rule adopted by the majority of lower courts is therefore correct because it protects all of the government's interests. By treating dismissal as one option among many, the majority rule allows district courts to punish and deter seal violations without inhibiting the government's interest in preventing and redressing fraud. Thus, district courts can impose financial penalties, they can disqualify attorneys, and in extreme cases, they can dismiss a relator's complaint.

State Farm's rule, by contrast, counterproductively pits the government's interests against each other. By mandating dismissal for every seal violation, State Farm makes it harder for the government to recover for fraud and deters qui tam relators from coming forward. That logic elevates the government's interest in secrecy above its more

important interest in redressing fraud. What is worse, State Farm's rule imposes costs on the government even when dismissal would serve *none* of the statutory purposes, *e.g.*, even when the underlying case is meritorious, even when the seal violation did not harm the government in any way, and even when the government lacks the capacity to bring its own lawsuit. In the process, State Farm's rule delivers a windfall to those who defraud the government—a result Congress could not have intended.

A discretionary rule also finds support in Congress's prolonged acquiescence to *Lujan*, and in the canon of constitutional avoidance.

B. State Farm argues that compliance with the seal requirement is a precondition to suit. It is not. In each case State Farm cites, the statutes used conditional language—*e.g.*, "if," or "unless"—to clearly condition the right to sue. The seal requirement has no such language. It contrasts not only with the statutes State Farm relies upon, but also with other provisions of the FCA that clearly condition the relator's right to conduct the action on the government's decision not to intervene. 31 U.S.C. § 3730(b)(4)(B), (c)(3). That condition was fulfilled here, and State Farm is wrong to suggest that courts can imply additional conditions. Independently, this Court has also held that violating a precondition to suit is not necessarily fatal to a cause of action when, as here, dismissal would not serve the statutory purpose.

C. The lack of conditional language also defeats State Farm's argument that maintaining the seal is a condition on the assignment of the government's

claim to the relators. In any event, assignors and courts have discretion to waive the non-occurrence of a condition on assignment. Thus, even if State Farm is correct that compliance with the seal constitutes such a condition, a discretionary remedy is appropriate.

D. Even if the Court concludes that violations of the FCA's seal requirement generally compel dismissal, a discretionary standard is appropriate here because this case does not involve a statutory violation—it only involves the violation of a court order. Specifically, the Rigsbys complied with every word of § 3730(b)(2) by filing their complaint in camera, maintaining the seal for at least sixty days, and delaying service until ordered. When Scruggs and his colleagues later covertly disclosed the existence of the lawsuit to the media, those disclosures violated the district court's seal order, but they did not violate any statutory requirement.

District courts have always had discretion to determine the appropriate sanction for violations of their own orders, including seal orders, and FCA seals are no different. Indeed, because the district court has the discretion to lift its seal order altogether after sixty days, it follows that the court has the lesser power to impose a sanction short of dismissal for violations of that same order.

E. In the alternative, State Farm proposes modifications to the discretionary test. It argues that the test should include potential harm to the government as well as harm to the defendant. This argument has not been preserved, and is meritless in any event because State Farm's proposed modifications are inconsistent with the FCA's text

and purpose, which establish that the seal requirement protects only the government, and only from actual, as opposed to imagined, harm. Even if the Court is inclined to accept State Farm's modifications, they do not help State Farm in this case because the seal violations here reached only a handful of people, and therefore did not even potentially harm the government's investigation or State Farm's reputation.

II. The lower courts correctly declined to dismiss the complaint.

A. All of the discretionary factors—harm to the government, the severity of the violation, and bad faith—weigh against dismissal. There was no harm to the government, the seal was completely intact for 103 days, there was no media disclosure of the existence of the lawsuit until after the seal was lifted, and the relators themselves were innocent of any wrongdoing. The relators' prior attorneys, who violated the seal, are long gone and will not benefit if the judgment below is affirmed. Moreover, State Farm actually committed fraud and will escape liability if the case is dismissed. Thus, dismissing the complaint will punish the innocent and reward the guilty, without vindicating the interests that motivated Congress to enact the seal in the first instance.

B. The Court can also rule on the alternative ground that FCA defendants lack the right to seek dismissal for seal violations. Whether mandatory or not, the seal requirement does not confer any rights on defendants—it only protects the government. The ordinary rule is that a defendant cannot raise a defense based on the rights of another. There is no

reason to deviate from that rule here because the government is capable of pursuing its own interests, and it has never urged dismissal.

III. Finally, State Farm's factual "plain error" argument, whereby it attempts to allege additional seal violations, should be rejected as outside the scope of the Question Presented and also meritless.

ARGUMENT

I. The Lower Courts Applied The Correct Standard To Determine Whether Seal Violations Warrant Dismissal.

The Fifth Circuit and the district court correctly held that dismissal is a discretionary sanction for a seal violation and its propriety turns on whether the government was actually harmed, on whether the violation was severe, and on whether the relator acted in bad faith.

A. The False Claims Act's Text, Structure, History, And Purpose Establish That Seal Violations Warrant Discretionary Sanctions, Not Mandatory Dismissal.

Violations of the FCA seal warrant discretionary sanctions, not mandatory dismissal. We agree with State Farm that the Court should consider the text, structure, legislative history, and purpose of the statute.

1. The FCA's text and structure strongly suggest that Congress did not intend every seal violation to result in dismissal. The statute provides that "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be

served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2).

State Farm principal textual argument is that compliance with the seal requirement is "mandatory" because the statute uses the word "shall." Pet'r Br. 22-23. But not every mandatory duty compels a draconian sanction for breach. The problem with State Farm's argument is not that the statute uses permissive language, but that the word "shall" is insufficient to create a precondition to suit, and the seal provision contains no additional conditional language—*e.g.*, "if," "unless," or "in which case"—conditioning the relator's right to sue on compliance with the seal, or otherwise suggesting that violations compel dismissal.

When this Court has considered statutes with comparable language—*i.e.*, statutes that use "shall," but do not also use conditional language or specify a consequence for failure to comply—it has concluded that although the duty to comply is mandatory, the sanction for breach is flexible. For example, in *Dolan v. United States*, 560 U.S. 605, 608-09 (2010), the statute provided that restitution determinations shall be made within 90 days after sentencing, and the question was whether courts that inexcusably miss that deadline may make such determinations. The Court acknowledged that the deadline used the mandatory "shall," but emphasized that the statute did "not specify" the "consequences" of missing the deadline. *Id.* at 610-11. The Court concluded that it would be inappropriate to hold that a missed deadline disempowers a court from ordering restitution because "the statute seeks primarily to ensure that victims of a crime receive full

restitution," and it "seeks speed primarily to help the victims of crime and only secondarily to help the defendant." *Id.* at 612-13. Because "denying the victim restitution in order to remedy a missed deadline" would "defeat the basic purpose" of the statute, the Court refused to require that result. *Id.* at 615. Instead, it held that "[t]he fact that a sentencing court misses the statute's 90-day deadline, even through its own fault or that of the Government, does not deprive the court of the power to order restitution." *Id.* at 611. That holding was consistent with other cases, including *United States v. Montalvo-Murillo*, 495 U.S. 711, 718-19 (1990), where the Court explained that the fact that a "duty is mandatory" is not dispositive as to the "sanction for breach," and *Brock v. Pierce County*, 476 U.S. 253, 259 (1986), which reached a similar result when the statute spoke "in mandatory language," but "nowhere specifie[d] the consequences of a failure to" comply.[6]

Similarly, this Court's rules contain numerous mandatory requirements that do not compel dismissal. For example, the rules provide that the petitioner's brief "*shall* comply in all respects with Rule[] 33.1," which mandates that "[q]uotations in excess of 50 words *shall* be indented." S. Ct. R. 24.1, 33.1(b) (emphases added). But nobody would argue that the Court must reject State Farm's noncompliant brief (Pet'r Br. 26, 32, 55, and 57)—or, to take a sanction more analogous to the one State

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[6] These cases involve public officials, but as State Farm emphasizes, qui tam relators act "on behalf of the government." *E.g.*, Pet'r Br. 47. *See also* note 10, *infra*.

Farm urges, that certiorari must be dismissed as improvidently granted.

The FCA works the same way. Indeed, State Farm agrees. It concedes, for example, that in § 3730(c)(3), Congress provided that "[i]f the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts," and that the remedy for violations of this section "might well be subject to judicial discretion." Pet'r Br. 38 n.6. The FCA also provides—in the qui tam provision itself—that "the Government shall" notify the district court of its intervention decision "[b]efore the expiration of the 60-day period or any extensions obtained." 31 U.S.C. § 3730(b)(4). But nobody thinks that if the government is late in notifying the court, the relator's complaint must be dismissed.[7]

On the other hand, many FCA provisions compel dismissal of an action or condition a relator's right to sue on compliance. Section 3730 includes a subsection entitled "Certain Actions Barred," detailing specific prohibitions that only apply to qui tam actions created by subsection (b), each of which begins with an explicit definition of the consequences, *e.g.*, "[n]o court shall have jurisdiction over an action," "[i]n no event may a person bring an action," and "[t]he court shall dismiss an action or claim under this section" before setting out their conditions.

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[7] Indeed, not even the government's complaint (should it intervene late) must be dismissed. *See United States ex rel. Siller v. Becton Dickinson & Co. By & Through Microbiology Sys. Div.*, 21 F.3d 1339, 1346 (4th Cir. 1994).

Id. § 3730(e). The public disclosure bar uses conditional language to compel dismissal of an action "*if* substantially the same allegations or transactions were publicly disclosed." *Id.* § 3730(e)(4) (emphasis added). The statute also disqualifies relators who committed crimes, providing that upon a relator's conviction, "that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action." *Id.* § 3730(d)(3). Congress could have specified that failure to file under seal or to maintain the seal likewise compels dismissal or disqualification, but it did not.

Another textual clue that Congress intended dismissal to be discretionary is that it used the phrase "under seal," which has a well-settled meaning to attorneys and judges. *See Sekhar v. United States*, 133 S. Ct. 2720, 2724 (2014) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (quotation marks omitted). Everybody reading that phrase would understand that the district court must enter a seal order, as it would do in many other contexts, and that the order would be enforced in the usual discretionary manner. *See infra* at 44. Congress legislated against that backdrop in 1986, and when, as here, Congress does not specify a different procedure, that silence constitutes "strong evidence that the usual practice should be followed." *Jones v. Bock*, 549 U.S. 199, 212 (2007). In a radical departure from usual practice, State Farm's mandatory dismissal rule would strip district courts of the

ability to exercise discretion to address seal violations. Such distrust for federal judges is unnecessary, unwise, and inconsistent with Congress's intent.[8]

2. The legislative history, statutory context, and purpose also discredit State Farm's mandatory dismissal rule.

The purpose of the FCA and of the 1986 amendments is to redress fraud by "encourag[ing] more private enforcement suits." Senate Report at 23-24. In 1986, the problem of fraud against the government was "severe," and Congress recognized that "only a coordinated effort of both the Government and the citizenry" could address it. *Id.* at 2. It therefore increased "incentives, financial and otherwise, for private individuals to bring suits on behalf of the Government." *Id.* The seal requirement addresses a secondary concern "that qui tam complaints filed in open court might tip off targets of ongoing criminal investigations." *Id.* at 16. By providing a seal, Congress sought to protect investigations from interference by their targets. However, this was a relatively minor point, as Congress did "not expect that disclosures from private false claims suits would often interfere with sensitive investigations." *Id.* at 24.

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[8] State Farm concedes the logic of this argument when it argues that the FCA statute of limitations, which provides that an action "may not be brought" after the limitations period has run, 31 U.S.C. § 3731(b), is subject to tolling notwithstanding its mandatory language because statutes of limitations commonly work that way. Pet'r Br. 27.

The best interpretation of the statute is one that advances all of its purposes simultaneously. Necessarily, such an interpretation must afford district courts discretion in fashioning appropriate sanctions for seal violations. That is because every seal violation is different: some have no effect on government investigations, while others may hobble them; some occur on day one, while others happen years later; some result in widespread publicity, while others fizzle; some are inadvertent, while others are willful, and so on. A discretionary test allows district courts to consider the unique facts of each case and achieve Congress's purpose. In exercising that discretion, courts may impose a broad range of sanctions, including financial penalties and the disqualification of attorneys who engage in misconduct. This allows courts to punish and deter seal violations without sacrificing the government's primary interest in preventing and redressing fraud through qui tam actions.

For example, in *United States ex rel. Bibby v. Wells Fargo Home Mortgage, Inc.*, 76 F. Supp. 3d 1399, 1401 (N.D. Ga. 2015), the relators violated the seal by privately communicating with the media about the case, which proved meritorious. When the violations were revealed, the defendants moved to dismiss. The court deemed dismissal inappropriate because it would "provide a windfall to [the defendant] and harm the Government (and public)," but ordered the relators to pay $1.61 million to the government—an amount that was "sufficient to provide proper compensation to the Government, vindicate the integrity of the judicial process, and accomplish the appropriate deterrent effect." *Id.* at

1416. Such a substantial financial penalty obviously constitutes stern punishment and a strong deterrent against future violations. Simultaneously, it benefitted the government and preserved a meritorious action, advancing all of Congress's purposes.

State Farm's mandatory dismissal rule, by contrast, forces a false choice among Congress's objectives. By treating dismissal as the only available sanction for a seal violation, State Farm takes every nuanced option off the table, precluding even the possibility of a solution that advances all of the statutory purposes. This is precisely the sort of "rigid, restrictive reading" of the FCA that this Court "has consistently refused to accept." *United States v. Neifert-White Co.*, 390 U.S. 228, 232 (1968).

Creating a false choice is bad enough to discredit State Farm's rule, but State Farm errs further by then making the wrong choice, prioritizing the secondary objective of maintaining the seal above Congress's primary objective of facilitating recoveries through qui tam actions—*in every single case*. By requiring the dismissal of meritorious or potentially meritorious actions, State Farm's rule obstructs Congress's purpose of preventing and redressing fraud.[9] And by imposing additional costs on relators, State Farm's rule will deter them from coming forward. *See* Senate Report at 28 (explaining that in the face of a risk of diminished recovery, relators

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[9] Because meritless actions will inevitably fail on the merits, State Farm's rule only changes the result vis-à-vis meritorious actions like this one.

"may decide it is too risky to proceed"). Thus, every time a case is dismissed under State Farm's rule, the government inevitably suffers some harm.

While one can imagine cases in which a seal violation so badly harms the government that dismissal is nevertheless warranted, it strains credulity that Congress would have mandated such an extreme sanction in every case, including those in which the violation does not prejudice anybody at all. It is a "great principle of public policy . which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Brock*, 476 U.S. at 260 (quotation marks omitted).[10] Where, as here, "important public rights are at stake," and where, as here, "there are less drastic remedies available," this Court "should not assume that Congress intended" to stymie enforcement by compelling dismissal. *Id.*

It is no answer to say that the dismissal of the relator's claim is harmless because it is without prejudice to the government. *See* Pet'r Br. 40. First, if potential whistleblowers must worry that even a seal

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[10] The language in *Brock* describing the government's agents applies with full force to a qui tam relator, who "is simply the statutorily designated agent of the United States." *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000). State Farm emphasizes (at 47-48) this agency relationship in attempting to argue that relators should be held to a higher standard than other litigants. In fact, the law has generally been more protective of those who seek to vindicate the public interest, not less. Such solicitude is especially appropriate for relators, who run great risks to protect the government.

violation beyond their control—*e.g.*, an inadvertent one, or one perpetrated by their attorneys without their knowledge—could result in dismissal, they will be less likely to risk their jobs, livelihoods, relationships, and reputations by coming forward in the first instance. *See* Senate Report at 5-6, 28. That reluctance will harm the government by inhibiting the detection and prosecution of fraud. Second, even if the government is allowed to pursue dismissed cases, it may lack the resources or access to information necessary to do so. *See id.* at 7-8. At a minimum, forcing the government to bring its own action would increase the costs of recovery, decreasing the likelihood that any particular case would be pursued. Third, in some cases, including this one, the statute of limitations will have run. To pursue the dismissed claim, the government will either have to seek tolling or move for belated intervention. There is no guarantee that either relief will be granted.

In sum, State Farm's rule twists a statutory provision that is intended to protect the government into one that is, on balance, harmful to the government's interests—but generates tremendous windfalls for those who defraud the government. That simply cannot be right.

3. Two additional considerations support a discretionary rule. First, Congress has acquiesced. When Congress amended the FCA in 2009 and 2010, the relators' rule was the law in the Second and Ninth circuits, and many district courts. The United States had likewise accepted it, and the Sixth Circuit's mandatory dismissal rule did not yet exist. But even though Congress has not hesitated to

overturn decisions that undermine the FCA, it did not overturn *Lujan*. Instead, it overturned other decisions that allowed defendants to "escape responsibility for proven frauds." S. Rep. No. 111-10, at 4 (2009). As this case demonstrates, State Farm's mandatory dismissal rule would facilitate such escapes, frustrating Congress's avowed purpose.

Second, the canon of constitutional avoidance supports discretionary sanctions. Speech about frauds against the government is core First Amendment speech, and is not covered by the seal, *ACLU v. Holder*, 673 F.3d 245, 254 (4th Cir. 2011)—but relators will be chilled from participating in public discourse about the underlying facts of their cases if they must worry that any seal violation, however slight, will doom their claim. Discretionary sanctions mitigate that risk. *Cf. Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004) (explaining that the use of the least restrictive means avoids chilling).

B. Compliance With The Seal Provision Is Not A Precondition To Suit.

State Farm attempts to distinguish the FCA seal from every other seal requirement by arguing that it is a statutory prerequisite to suit that is "part and parcel" of the right of action itself. Pet'r Br. 24-28. That is unpersuasive because, in contrast with the statutes State Farm cites, Congress never conditioned a relator's ability to sue on complying with or maintaining the seal. State Farm's cases therefore only prove—via contrast—that compliance with a seal order is not a precondition to suit.

1. In *McNeil v. United States*, 508 U.S. 106 (1993), the Court considered the Federal Tort Claims

Act's exhaustion requirement, and deemed it mandatory. Unlike the FCA seal requirement, however, the FTCA uses express conditional language stating that "[a]n action shall not be instituted *unless* the claimant shall have first" exhausted administrative remedies, 28 U.S.C. § 2675(a) (emphasis added), and the purpose of the exhaustion requirement is to benefit the defendant by reducing its defense costs, 508 U.S. at 112.

In *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), the Resource Conservation and Recovery Act provided, in a section entitled "Actions prohibited," that "[n]o action may be commenced . . prior to sixty days after the plaintiff has given notice of the violation" to the administrator of the EPA, to the state, and to the violator. *Id.* at 25 (quoting 42 U.S.C. § 6972(b)(1) (1982)). The plaintiff commenced an action without notifying the state and the Court held that dismissal was required because "[t]he language of this provision could not be clearer" in stating that "[a]ctions commenced prior to 60 days after notice are 'prohibited,'" thus creating a "condition precedent for suit." *Id.* at 26. The FCA seal requirement, by contrast, has no language analogous to the phrase "no action may be commenced," and it does not fall within the portion of the FCA entitled "Certain actions barred," 31 U.S.C. § 3730(e), which is the clear analogue to RCRA's "Actions prohibited."

In *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 161 (1914), the Court considered the Hurd Act, which specified that providers of materials and labor on government construction projects could sue the general contractor for payment on a bond only "if no suit should be

brought by the United States within six months from the completion and final settlement of said contract." The Court explained that "[t]he act does not place a limitation upon a cause of action theretofore existing, but creates a new one upon the terms named in the statute." *Id.* at 162. That new right of action was "specifically conditioned" upon the United States' not suing within six months, and so compliance was deemed "essential to the assertion and benefit of the liability itself." *Id.* The Court thus dismissed a premature lawsuit. *Id.* at 163.

McCord is distinguishable for two reasons. First, the Hurd Act created an express condition using the paradigmatic conditional construction "if . . then . " The FCA seal uses no analogous language. Second, unlike the new cause of action in *McCord*, the FCA qui tam cause of action existed for more than a century before the 1986 amendments imposed a seal requirement. That cuts against finding that the seal requirement constitutes a limitation on the right to sue, as opposed to a procedural rule.

To the extent the Hurd Act is relevant, this case more closely resembles *United States for Use of Alexander Bryant Co. v. N.Y. Steam Fitting Co.*, 235 U.S. 327 (1914). The cause of action created by the Hurd Act contained three statutory "provisos," one of which was that by a certain time, the plaintiff had to furnish notice of a suit against the surety company to all known creditors in order to give them an opportunity to intervene in the suit. *Id.* at 336. The proviso used the mandatory "shall." *Id.* Nevertheless, the Court held that, unlike the six-month waiting period at issue in *McCord*, the "provision for notice" to third parties "is not of the essence of jurisdiction

over the case, nor a condition of the liability of the" defendant. *Id.* at 341. The Court recognized that the proviso was for the benefit of other potential plaintiffs against the defendant surety company, and not for the benefit of the surety company itself, such that giving the surety company the right to evade liability if a plaintiff fails to comply would create "a contradiction of interests and rights" that Congress could not have intended in a remedial statute. *Id.*

In *Fleisher Engineering & Construction Co. v. United States for the Use & Benefit of Hallenbeck*, 311 U.S. 15, 18 (1940), this Court summarized the distinction between *McCord* and *Alexander Bryant* as follows: "In short, a requirement which is clearly made a condition precedent to the right to sue must be given effect, but in determining whether a provision is of that character the statute must be liberally construed so as to accomplish its purpose."

Fleisher involved the Miller Act, which then provided that a plaintiff "shall have a right of action upon giving written notice to" the defendant contractor. *Id.* at 16 n.1 (reproducing statute). The same subsection further provided that "[s]uch notice shall be served by registered mail" or other method used by U.S. marshals. *Id.* The plaintiff had used an improper method to give the required notice, but the Court allowed the suit to proceed, explaining that while the notice requirement "defines the condition precedent to suit" by stating that the plaintiff *shall* have a right of action *upon* giving notice, the mail requirement merely "provide[d] for the mode of service of the notice," and did not create a precondition to suit. *Id.* at 19. The Court stressed the remedial purpose of the statute, and the

subsidiary function of the mail requirement. *Id.* at 18-19.

Fleisher and *Alexander Bryant* compel a holding that compliance with the seal requirement is not a precondition to suit. There is no clear language imposing a condition. Instead, the seal provision merely describes the mode by which relators must file their complaints. Converting that procedural specification into an additional condition would frustrate the purposes of the FCA by inhibiting qui tam suits while conferring a windfall on defendants.

2. The lack of conditional language surrounding the seal requirement also contrasts with the portions of § 3730 that expressly condition the relator's right to conduct the action on the government's decision not to intervene. *See* 31 U.S.C. § 3730(b)(4)(B) (providing that if the government "notifies] the court that it declines to take over the action," then "the person bringing the action shall have the right to conduct the action"); *id.* § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action."). Like the notice condition in *Fleisher*, this condition is explicit. Implying an additional condition on the relator's right to sue would conflict with those provisions and effectively rewrite the statute. *Cf. Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 (2007) (holding that when a statute provides that something "shall" occur "if the specified criteria are met," it "operates as a ceiling as well as a floor" such that it would constitute an implied repeal to "engraft[]" an additional criterion onto the test).

3. Even if the seal requirement is a precondition to suit, it does not follow that dismissal is required. In its certiorari-stage papers, State Farm relied on *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651, 1656 (2015), which found that the pre-suit conciliation requirement of Title VII was "a necessary precondition to filing a lawsuit," but held that "the appropriate remedy" if the Commission fails to engage in the required conciliation is not dismissal of the action, but "to order the EEOC to undertake the mandated efforts to obtain voluntary compliance." The key point—which holds true for Title VII and the FCA—is that dismissal does not serve the statutory purpose. *See id.* at 1654 (explaining that the statute treats "the conciliation process not as an end in itself, but only as a tool to redress workplace discrimination").

4. State Farm is wrong to argue (at 24-25) that the seal requirement is a part of the right of action itself, and therefore somehow uniquely limits the relator's right to sue. State Farm bases this contention on nothing more than the fact that the seal requirement appears in the same subsection of the statute, § 3730(b), as the qui tam cause of action. This location-based argument was rejected in *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 n.6 (2003), where the Court described it as a wrongheaded "formalism" that failed to explain many of the Court's precedents. To determine the import of particular limitations, the Court looked not to the "formal placement" of the provision, but instead to "contextual and historical indications of what Congress meant to accomplish." *Id.* The Court was particularly concerned that a "formal rule" "would

thwart the statute's object and relieve the respondent companies of all responsibility" for their statutory liabilities. *Id.*

State Farm's formalistic reading is wrong for the same reasons. It ignores that Congress placed the FCA's mandatory dismissal provisions in § 3730(e), and not § 3730(b). It also cannot account for the fact that other requirements in § 3730(b) do not limit the right of action. For example, § 3730(b)(4) requires the government to communicate intervention decisions in a timely fashion, but nobody thinks that a suit must be dismissed if the government is late. And as explained above, State Farm's interpretation would thwart the FCA's purposes.

Similarly, the provisos at issue in *Fleisher* and *Alexander Bryant* both appeared in the same statutory section as the right of action. Both were held not to constitute conditions on the right.

C. Compliance With The Seal Provision Is Not A Condition On The Assignment Of The Government's Claim.

State Farm also argues that compliance with the seal requirement is a condition of the assignment of the government's cause of action to the relator. Pet'r Br. 28. State Farm never made this argument below, and it now seeks to avoid preservation problems by dressing it up as an Article III standing contention.

This argument faces a high bar for two reasons. First, this Court will not infer that a statutory requirement abridges subject-matter jurisdiction absent clear language to that effect. *See Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006). Second, courts

should not infer that requirements constitute conditions of assignment "[u]nless the agreement makes it clear that the event is required as a condition," and not merely a promise. Restatement (Second) of Contracts § 227 cmt. d (Am. Law. Inst. 1981).

State Farm cannot meet that standard. While some provisions of the FCA, *e.g.*, the restriction on suits by members of the armed forces, 31 U.S.C. § 3730(e)(1), are expressly jurisdictional, the statute contains no language conditioning assignment or standing upon compliance with the seal, and a blanket rule denying Article III standing to relators for *every* seal violation would be inconsistent with Congress's intent.

Indeed, no case has ever discussed compliance with the seal as a condition of standing. The cases State Farm cites arise from the Ninth Circuit—which holds that dismissal for seal violations is discretionary. They explain that the only condition on assignment is that "the government itself chooses not to pursue such claims." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 748 (9th Cir. 1993).

State Farm's "assignment" argument also undermines its claim that dismissal is mandatory because assignors can waive the non-occurrence of a condition. When, as here, an assignor accepts for a substantial period of time the assignee's performance, "with knowledge of or reason to know of the non-occurrence of a condition of the [assignor's] duty," that acceptance "operates as a promise to [assign] in spite of that non-occurrence." Restatement (Second) of Contracts § 246. It has been six years since State Farm moved to dismiss, and the

government has never questioned the Rigsbys' right to sue.

Moreover, when "the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange." *Id.* § 229. This is a "flexible" rule, and "its application is within the sound discretion of the court." *Id.* § 229 cmt. b. In other words, even if State Farm's "assignment" theory is correct, it only proves that the remedy for seal violations is discretionary.

D. A Discretionary Standard Is Appropriate In This Case Because There Was No Statutory Violation.

Even if the Court concludes that a violation of the FCA seal provision compels dismissal, it should nevertheless apply a discretionary standard in this case because the violations issue here were of a court order, and not the statute itself.

The statute provides that "[t]he complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders." 31 U.S.C. § 3730(b)(2). State Farm has conceded that the relators complied with each requirement: the complaint was filed "in camera as the Act requires," Pet'r Br. 1; the seal was intact for 103 days, *see id.* 8; and it was not served on the defendants until after the district court so ordered, *see* J.A.67

When Scruggs and his colleagues later covertly disclosed the existence of this action, they violated

the district court's seal order—but not the statute, which says nothing about disclosures after sixty days.

Refusing to extend mandatory dismissal to violations of a court order is consistent with ordinary judicial practice. Seal orders have existed for decades, protecting trade secrets, settlement discussions, personal information, and other sensitive matters. *See, e.g.*, Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide* 5-16, Federal Judicial Center (2010), *available at* http://tinyurl.com/FJCSealGuide. When a party violates such an order, courts fashion an appropriate sanction under their inherent powers or the Federal Rules. Dismissal is a permissible, but rare, remedy for such violations. *See, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991). Instead, the more common remedies include damages or attorney's fees to the non-breaching party, fines, or perhaps the disqualification of a party's attorney. Congress intended FCA seal orders to work the same way, which is why it used the term of art "under seal." *See supra* at 29.

Consistent with that consensus, State Farm has not cited a case holding that a district court must dismiss a complaint as a sanction for the violation of a court order. Instead, all of the cases it cites emphasize the importance of complying with specific instructions codified in statutes. *See, e.g.*, *United States ex rel. Summers v. LHC Grp., Inc.*, 623 F.3d 287, 296 (6th Cir. 2010) (holding that Congress "decided that a sixty-day *in camera* period was the correct length of time"); *Hallstrom*, 493 U.S. at 27 ("[W]e are not at liberty to create an exception where Congress has declined to do so."). *See also* Pet'r Br. 36

n.5 (collecting cases for the same proposition). Those cases reflect an understanding, rooted in the separation of powers, that courts must obey congressional commands. But Congress did not command courts to extend the FCA seal beyond sixty days. At that point, the district court has discretion to extend or lift the seal. Surely, this greater power to lift the seal includes the lesser power to determine an appropriate punishment for a seal violation.

If the Court agrees, it should affirm because the lower courts correctly applied a discretionary standard.

E. State Farm's Alternative Discretionary Tests Are Inconsistent With The False Claims Act.

The lower courts correctly held that the *Lujan* test accurately reflects Congress's intent in enacting the seal requirement in 1986. The test allows the courts to consider harm to the government, the severity of the violation, and the bad faith of the perpetrators in deciding what sanction to impose. 67 F.3d at 245-47. It thereby allows district courts to protect the government's interest in secrecy while also accounting for the importance of qui tam suits to preventing and redressing fraud.

State Farm urges this Court to consider two additional factors. First, State Farm argues (at 51-55) that courts should consider potential, as opposed to actual, harm to the government. Second, it argues (at 55-57) that courts should weigh harm to defendants.

State Farm has not preserved this argument. In the Fifth Circuit, State Farm argued only that "the

Rigsbys' Complaint should be dismissed under either *Summers* [mandatory dismissal] or *Lujan*." Pet'r C.A. Br. 63. It never proposed another test, and it should not be able to do so now. In any event, State Farm's proposed modifications are inconsistent with the FCA and do not warrant a remand in this case.

1. It is pure chutzpah for State Farm to argue that potential harm to the government is grounds for dismissal. The principal "harm" to the government against which the seal protects is that a defendant like State Farm might thwart an investigation by, *e.g.*, shredding documents, making key witnesses unavailable, or otherwise hindering the government's efforts. In effect, State Farm is arguing, "You should punish the Rigsbys because we could have obstructed justice." That makes no sense.

Second, the cases State Farm cites do not support its position. Contrary to State Farm's description, the Second Circuit in *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995), did not adopt a "potential harm" test. Instead, the court held that the relator's failure to file under seal in the first instance "incurably frustrated the statutory purposes underlying" the seal requirement, including by "eliminat[ing]" any "settlement value that might have arisen from the complaint's seal status." *Id.* at 999. The elimination of leverage constitutes actual harm. Indeed, the Ninth Circuit read *Pilon* that way when it adopted the actual-harm standard. *See Lujan*, 67 F.3d at 245 (holding that *Pilon* "relied, at least in part, on the irreparable harm to the government caused by the complete failure to abide by any of the seal provisions"). For similar reasons, by adopting the

Second Circuit's holding that "a violation that results in an incurable and egregious frustration of the 'statutory objectives underlying the filing and service requirements' merits dismissal with prejudice," the Fourth Circuit did not adopt a potential-harm test. *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015) (quoting *Pilon*, 60 F.3d at 998)).

Third, State Farm is wrong to argue that potential harm is easier to assess than actual harm. The standard is unclear because State Farm does not answer key questions about it: How likely must the potential harm be? How severe? And how does potential harm weigh against other factors? Nobody knows. Even if the standard was clear, courts would have to speculate to answer those questions, and it is inevitable that different judges would reach divergent conclusions on similar facts.

An actual-harm standard avoids those problems because the government can say whether it was prejudiced. State Farm points out that sometimes the government will not know what defendants do behind closed doors, and so it will not know whether it was harmed. But if the government cannot say with confidence that it was prejudiced, courts should presume that it was not; as Congress explained, seal violations will not "often interfere with sensitive investigations." Senate Report at 24. Moreover, in grey-area cases, dismissal is counterproductive: based on the risk of harm to the government, State Farm would have the court impose a sanction that is guaranteed to harm the government. A different sanction would better serve the statutory purpose.

Fourth, State Farm's argument that *Lujan*'s actual-harm rule is insufficiently protective of the

government is belied by the fact that the United States has now repeatedly endorsed that rule without suggesting that it should be modified to include potential harm. *See* U.S. Invitation Br. 13 ("Although cases could arise in which additional factors would be relevant, the three factors considered in *Lujan* and applied below capture the most pertinent criteria that a district court should consider."); *see also* U.S. C.A. Br. 18-19; U.S. Invitation Br. at 12, 14-15, *United States ex rel. Summers v. LHC Grp., Inc.*, No. 10-827 (May 26, 2011).

Finally, adopting State Farm's potential-harm rule would not warrant a remand because there was no such potential here. The violations in this case did not prematurely reveal to State Farm that the qui tam action was pending. J.A.67. Thus, as the district court found, the violations "*could not have* impaired the government's ability to investigate." Pet. App. 67a (emphasis added).

2. State Farm's contention that courts should consider harm to defendants is similarly weak. First, seal violations often *help* defendants by giving them information that allows them to make plans. Denying that advantage is the principal reason the seal exists.

State Farm focuses on reputational harm, but both the government and the Ninth Circuit have explained that "protecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision." *Lujan*, 67 F.3d at 247; U.S. Invitation Br. 12 n.5. Indeed, the legislative history was explicit that "[b]y providing for sealed complaints," Congress did "not intend to affect defendants' rights in any way." Senate Report at 24. State Farm omits this

language from its brief in favor of a sentence fragment saying that the seal "protects the Government's and the defendant's interests." *Id.* But that language refers to a different accommodation: Congress gave defendants twenty days after service to answer the complaint, so that they have adequate time to respond after learning whether the government has chosen to intervene. *Id.*; *see also Lujan*, 67 F.3d at 247 (analyzing legislative history).[11]

In any event, the notion that the seal requirement protects defendants' reputations is illogical because notwithstanding the seal, relators are free to publicize defendants' wrongful conduct. *ACLU*, 673 F.3d at 254. Thus, even before the seal is lifted, and well before the facts are tried in court, defendants are already exposed to the relator's version of events. The only thing the seal prevents is the additional disclosure of the pendency of the qui tam action.

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[11] The few cases that consider a defendant's reputation fabricated that interest out of whole cloth. In *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908, 912 (E.D. Va. 1989), the court cites (but does not quote) the Senate Report, which never mentions defendants' reputations. In *Pilon*, the court states that "[o]ther interests not addressed by this legislative history are also protected," including "a defendant's reputation to some degree when a meritless qui tam action is filed." 60 F.3d at 999. The use of the passive voice was deliberate because to the extent a defendant's reputation "is protected," that protection is accidental. Subsequent cases cite *Erickson*, *Pilon*, or their progeny.

State Farm argues that this additional disclosure does damage because "the public may think that the suit is brought by or has the approval of the government." Pet'r Br. 56. But it cites nothing to support this speculation or quantify the additional reputational harm. Also, the district court in an FCA case will lift the seal before the allegations are proven—indeed, before the complaint is served on the defendant—which means that FCA defendants inevitably face a period during which unproven qui tam allegations are public knowledge. State Farm does not explain how a defendant's reputation will suffer if the public discovers the lawsuit slightly earlier, while the seal is still in place.

If, despite all that, the Court believes that the seal requirement might serve to protect some defendants' reputations, it should nevertheless hold that State Farm cannot cite reputational harm for three reasons. First, thousands of homeowner suits made similar allegations, and some alleged fraudulent NFIP adjustments. Pet. App. 64a-66a. Any additional disclosures arising out of this action were redundant. Second, the seal violations did not result in a premature public disclosure of the qui tam action, so the public did not prematurely learn that State Farm was a defendant in one. And third, State Farm *actually violated the FCA*, and so it has no right to a squeaky-clean reputation anyway. *See Pilon*, 60 F.3d at 999 (the defendant's reputation is protected only "when a meritless qui tam action is filed").

II. The Lower Courts Did Not Abuse Their Discretion By Refusing To Dismiss The Complaint.

A. The Discretionary Factors Weigh Against Dismissal.

State Farm urges this Court to reweigh the *Lujan* factors and deem the district court's refusal to dismiss the complaint an abuse of discretion. This request is outside the scope of the Question Presented, which asks only what legal standard applies.

If the Court does consider the propriety of dismissal, it should easily conclude that the district court was within its discretion to deny State Farm's motion to dismiss. The standard of review is deferential, and the district court carefully and appropriately considered each of the key factors.

First, as State Farm's attorneys admitted, the seal violations did not tip it off. J.A.67 Even after the seal violations, the journalists who received the evidentiary disclosure did not disclose the existence of the action to the public, which means that the violations resulted in disclosure to only a handful of people. Therefore, they could not have prejudiced the government's investigation. Pet. App. 67a.

Second, the seal remained intact for 103 days, and the ultimate disclosure was limited. The government thus had ample time to investigate and consider the case without public interference. The government chose not to intervene, proving that the violations did not exert undue pressure on it. The case also did not settle, refuting any allegation that the relators pressured State Farm to the table.

Third, although State Farm urges (at 43) the Court to place great weight on bad faith, the Rigsbys themselves did not violate the seal or act in bad faith. Instead, the violators were Scruggs and his colleagues, who acted without the Rigsbys' knowledge or consent. Those attorneys are out of the case.

State Farm argues (at 45) that as a matter of agency principles an attorney's conduct should be imputed to his clients. To be sure, courts may sanction clients for attorney misconduct in appropriate cases. But they also have the discretion to refrain from doing so. *See, e.g.*, *Shea v. Donohoe Const. Co.*, 795 F.2d 1071, 1077 (D.C. Cir. 1986) ("[W]here attorney misconduct is involved, this court has been notably reluctant to affirm dismissal under the punishment or deterrence rationale unless the client himself is shown to deserve the sanction.").

The lower courts were justified in refusing to sanction the Rigsbys for Scruggs' misconduct. The fact that Scruggs and his associates were disqualified is important because dismissing the lawsuit will not punish those lawyers' bad faith—and affirming will not reward it.

Moreover, unlike large and powerful entities, *e.g.*, State Farm, which have substantial ability to control their lawyer agents, individuals like the Rigsbys have far less control over attorneys like Scruggs, and so holding the Rigsbys responsible for his misconduct makes little sense. As a recent brief signed by ninety legal ethics experts argued, "the sins of the lawyer should never be visited upon the client because the lawyer-client relationship is different in kind from that of other principal-agency relationships." Br. of Legal Ethics Professors &

Practitioners & the Ethics Bureau at Yale at 30, *Maples v. Thomas*, 132 S. Ct. 912 (2012) (No. 10-63).

At a minimum, to impute attorney misconduct onto clients, the misconduct must occur within the scope of the agency relationship. Here, however, Scruggs and his associates were not acting as the Rigsbys' agents when they disclosed this action. Instead, they were acting "as advocates for their clients who had homeowners policy claims." Pet. App. 68a. "[A] litigant cannot be held constructively responsible for the conduct of an attorney who is not operating as [her] agent in any meaningful sense of that word." *Maples*, 132 S. Ct. at 923 (quotation marks omitted). Such imputation would be especially unjust here because Scruggs effectively sacrificed the interests of the Rigsbys (who stood only to lose from the disclosures) in an attempt to benefit the homeowners. It would be odd to sanction that betrayal by punishing the victims.

Imputation aside, the cases State Farm cites (at 43-44) for the proposition that bad faith justifies dismissal do not hold that bad faith *always compels* dismissal. Instead, courts should weigh bad faith alongside other factors to fashion an appropriate sanction for each case. That is precisely what the lower courts did here. To reverse would effectively transform the holistic *Lujan* test into a single-factor bad-faith test—a proposition unsupported by any authority whatsoever.

Finally, the Court should not ignore that State Farm defrauded the United States. The bellwether trial alone proved hundreds of thousands of dollars in damages arising from a single home. State Farm used the same fraudulent techniques to manipulate

insurance claims in thousands of homes, defrauding the NFIP out of hundreds of millions of dollars. If the relators' lawsuit is dismissed, the case may fail. That result would be manifestly unjust. It illustrates everything that is wrong with State Farm's rule, and counsels strongly in favor of a more restrained approach.

B. State Farm Has No Right To Enforce The Seal Requirement.

We argued below that "State Farm also lacks standing to seek dismissal under § 3730(b) because Congress enacted that provision solely to protect the interests of the government." Opp'n Br. of Cross-Appellees 4, 57-58 (Sept. 16, 2014). The court of appeals assumed, without deciding, that State Farm can raise a seal violation as a defense to liability. Pet. App. 22a n.9. But the simplest way to resolve this case could be to hold that while the government can request sanctions for a seal violation, defendants cannot.

It is well-settled that a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). This rule applies equally to defenses. For example, a defendant cannot raise violations of another person's Fourth Amendment rights as a basis to suppress evidence. *See, e.g.*, *Rakas v. Illinois*, 439 U.S. 128, 150 (1978). And outside the First Amendment context, a defendant cannot challenge a criminal statute that clearly applies to him as overbroad. *See New York v. Ferber*, 458 U.S. 747, 767 (1982).

The FCA seal requirement does not grant rights to defendants. The statute never provides that a defendant may raise a seal violation, nor specifies that a defendant should benefit if one occurs. And the legislative history is explicit that the seal requirement does not "affect defendants' rights in any way." Senate Report at 24.

By nevertheless attempting to use a seal violation as a basis for a defense, State Farm effectively argues that when a defendant receives one windfall—*i.e.*, useful information that it is not supposed to have—it should then receive another—*i.e.*, dismissal. There is no evidence that Congress intended to put fraudsters in such a charmed position.

This Court has recognized limited exceptions to the general rule against asserting third-party rights when a party "has a 'close' relationship with the person who possesses the right," *and* when "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). In FCA cases, the right to enforce the seal belongs to the government. But State Farm's relationship with the government is not "close"—it is adversarial. Moreover, there is no "hindrance" to the government asserting its own rights. Indeed, the government is involved in every FCA action and can provide its views at every stage of the proceedings.

Finally, this argument is supported by precedent holding that FCA defendants lack standing to raise various pro-government procedural requirements as defenses to liability. *See, e.g.*, *United States ex rel. Maxfield v. Wasatch Constructors*, No. 2:99-cv-00040 PGC, slip op. at 2, 2005 WL 4094042 (D. Utah May

27, 2005); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc.*, 755 F. Supp. 1040, 1054 (S.D. Ga. 1990); *United States ex rel. Mikes v. Straus*, 931 F. Supp. 248, 259 (S.D.N.Y. 1996). That logic applies here.

III. This Court Should Reject State Farm's Factual "Plain Error" Argument.

State Farm argues that the lower courts erred by refusing to consider alleged seal violations that occurred after the seal was partially lifted. Its brief (at 11-12) alleges four such violations:

1. On February 28, 2007, Congressman Gene Taylor provided written testimony to the House Oversight and Investigations Subcommittee disclosing that the Scruggs law firm represents the Rigsbys in a qui tam case. J.A.543-52. The day before, Zach Scruggs (son of Dickie and also an attorney) had sent an e-mail referring to the testimony in the subject line. J.A.553.
2. On January 24, 2007, Scruggs disclosed the existence of the qui tam action to the Rendon Group, a public relations firm hired to assist Scruggs.
3. At some point in May 2007, the Rendon Group obtained a copy of the amended complaint and circulated it internally. J.A.604-47.
4. On June 6, 2007, Scruggs' assistant e-mailed the amended complaint to CBS News. J.A.489-534.

This Court should refuse to consider these allegations. First, whether particular incidents violate the seal is outside the Question Presented.

The lower courts' reasoning is also not clearly erroneous. Deference is warranted: in concluding that the partial unsealing order rendered the seal moot, the district court was interpreting its own order, and the Fifth Circuit offered additional grounds for that conclusion, *i.e.*, the public filing by Renfroe, in a case about State Farm's documents, disclosing the high likelihood that Scruggs represented the Rigsbys in a qui tam action. That disclosure ought to have tipped off State Farm—at least to the degree that State Farm could do whatever it planned to do to frustrate the government's investigation—thus rendering the seal moot.

Even putting aside the partial unsealing, there are good reasons not to revisit the lower courts' findings.

First, Representative Taylor's February 28, 2007 statement was evidence of a minor violation at most. Taylor submitted a nine-page written statement to a congressional subcommittee, which mentions the qui tam action in passing on page six. J.A.548. Not even the most cloistered C-SPAN enthusiast would have seen it at the time. State Farm has not presented evidence that any member of the public read it, and no media coverage revealing the existence of the qui tam action resulted from it. Indeed, State Farm's counsel admitted that State Farm itself did not learn of the lawsuit until after the seal was lifted. *Id.* 67 (stating that before the seal was lifted, "there were suspicions that Congressman Taylor may know something, but no actual confirmation").

Even assuming that Taylor learned of the lawsuit from Scruggs (a fact that State Farm has not proved), a disclosure to a sitting Congressman does not clearly violate the seal. The FCA requires disclosure of the lawsuit to the "Government." Taylor was part of the Government. The Fifth Circuit assumed without deciding that disclosure to a Congressman could violate the seal (Pet. App. 22a n.9)—but it is doubtful that Congress intended to keep itself in the dark about frauds against the fisc. At least, the ambiguity defeats any suggestion of bad faith.

Second, State Farm's arguments about disclosures to the Rendon Group were not preserved. *See* Pet'r C.A. Br. 63-65 (listing only disclosures to the media and Taylor). In any event, disclosures to the Rendon Group are not violations because an internal transmission to a retained consultant is not a public disclosure. If this internal communication was a violation, it cannot be regarded as bad faith.[12]

Third, the June 2007 disclosure to a CBS producer was minor: State Farm does not even allege that CBS subsequently aired a story about the case. Moreover, by then the seal surely was moot because a separate qui tam action against State Farm, raising overlapping allegations, had been unsealed. *See Branch Consultants, L.L.C. v. Allstate Ins. Co.*, No. 06-cv-4091, Dkt. 25 (E.D. La. May 22, 2007)

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[12] Based on the pages State Farm cites (J.A.57, 569-70) for the January 24, 2007 disclosure to the Rendon Group, there was no clear disclosure on that date.

(unsealing complaint). Thus State Farm already was aware that a government investigation had begun.

Finally, even if this Court decides to treat all of these disclosures as violations, dismissal would remain inappropriate because no prejudice resulted, and none of the alleged violations involve misconduct by the Rigsbys or anybody else with an ongoing interest in this case. On these facts, State Farm should not escape liability for its proven fraud.

CONCLUSION

This Court should affirm the judgment below.

Respectfully submitted,

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